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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RACHEL HARARI, Plaintiff and Appellant, v. ABE HECHT, as Trustee, etc. Defendant and Respondent.	B211115 (Los Angeles County Super. Ct. No. BP077677)

APPEAL from an order of the Superior Court of Los Angeles County. Aviva K. Bobb, Judge. Affirmed.

Hammer Law Offices, Sheryl Hammer and Robert S. Gerstein for Plaintiff and Appellant.

Augustine and Seymour and Michael R. Augustine for Defendant and Respondent.

In the underlying action, appellant Rachel Harari, a beneficiary of the Hecht Family Trust (the Trust), moved to set aside an order of the probate court affirming a "binding mediation," which purported to resolve all disputes between appellant and the trustee, Abe Hecht, who is appellant's brother and the respondent in this action. The basis for appellant's motion was that her former attorneys failed to obtain her consent before agreeing to participate in the binding mediation. Appellant learned of her attorneys' alleged misfeasance on the day of the mediation, more than one month before the court entered the order, but did not bring this issue to the attention of the court or respondent, and waited three and a half years after entry of the order before moving to vacate. The court denied appellant's motion to vacate on the grounds that (1) the motion was untimely; (2) appellant failed to establish extrinsic fraud; and (3) appellant had been compensated for any damage suffered in a prior proceeding in which she sued her former attorneys. We agree that appellant failed to seek relief in a timely and diligent manner after learning of the alleged misfeasance. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2004, appellant filed a petition in probate for an order compelling the trustee of the Trust to prepare a trust account. Respondent was the trustee. On November 15, 2004, the parties held a mediation in the offices of appellant's attorneys.[1] On November 26, 2004, the mediator, retired judge Edward M. Ross, issued a "binding mediator award." On December 8, 2004, counsel for respondent filed the mediator's award with the court, stating that it "resolves all issues presented by the pending Petition and Accounting and Objections thereto." On

[1] Respondent had, by this point, submitted to the court a proposed accounting, and appellant had submitted objections.

December 30, 2004, the court entered an order approving the account of the trustee (respondent) and directing that the Trust's assets be distributed.[2]

Three and a half years later, in June 2008, appellant moved to set aside the December 2004 order. In her moving papers, appellant presented evidence that the Trust instrument contained a provision stating that the trustee was to submit "all disputes, controversies, claims, and demands" to "mediation and binding arbitration." The instrument further stated that "[i]f the dispute, controversy, claim, or demand has not been resolved by negotiation or mediation as provided above within sixty (60) days of the service upon all interested parties of the Notice to Negotiate, any interested party may initiate binding arbitration before a single retired judge in accordance with the Rules of the American Arbitration Association ('AAA')."[3]

Appellant also submitted evidence indicating that she was informed for the first time, a half hour before the start of the November 2004 mediation, that the

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[2] The order stated that the parties "appeared before [Judge Ross] and agreed that any decision of the mediator would be binding on the parties, pursuant to the provisions of the Trust." Accordingly, the petition and account submitted by respondent was "deemed to be a final account and petition for distribution, pursuant to stipulation and the findings of the mediator and is so approved." The order instructed respondent to distribute the Trust assets "pursuant to the stipulation and the findings of the mediator" by dividing the residue of the Trust estate into two equal shares, one to be distributed to respondent and the other to be placed into a new trust (the Rachel Harari Trust). Respondent was instructed to transfer to the new trust a parcel of real property located in West Hills. Respondent was also instructed to pay to the new trust the sum of $100,000 immediately and an additional $167,272 by way of a promissory note. Finally, the order instructed respondent to pay appellant's attorney fees.

[3] The moving papers did not fully articulate the intervening steps. According to paragraph 4.2, once a dispute arose, the parties were to "first endeavor to resolve their differences by good faith negotiation" initiated by a written "Notice to Negotiate." paragraph 4.3 provided: "If the dispute has not been resolved by negotiation as provided above, the parties shall endeavor to settle the dispute by mediation."

mediation was going to be binding. At the same time, she learned that the lawyer familiar with the case, Christopher Johnson, was not available to participate in the proceeding, and that the matter would be handled by his partner, Mark Russakow. Appellant informed Russakow that: (1) she had not agreed to binding mediation; (2) in her opinion, the case had not been sufficiently prepared for a binding proceeding because certain documents and appraisals had yet to be acquired; and (3) she wished to re-schedule the proceeding to a time when Johnson would be available. Despite appellant's objections, Russakow went forward with the mediation.[4] Appellant did not personally participate.

In his opposition, respondent presented evidence that in September 2004, his attorney, Michael R. Augustine, sent a demand for arbitration to Russakow.[5] Thereafter, Augustine believed the proceeding scheduled for November 2004 was the binding arbitration set forth in paragraph 4.4 of the Trust instrument. Augustine was never advised differently by appellant or her counsel. On the day of the proceeding, Judge Ross made suggestions for simplifying and streamlining the hearing by allowing him to question witnesses directly. Neither side objected.

The opposition offered five reasons to deny appellant's motion to set aside the December 2004 order: (1) it was barred by Code of Civil Procedure section 473, subdivision (b), which requires that motions to vacate be submitted within six months of the subject judgment or order; (2) it was barred by the three-year statute of limitations for fraud; (3) no fraud was perpetrated on appellant by respondent; (4) respondent was prejudiced by the delay because he had fully complied with the

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[4] To establish the facts supporting her motion to set aside the December 2004 order, appellant relied on transcripts of depositions and trial transcripts from a different litigation, *Harari v. Russakow, et al.*, (Super. Ct. L.A. County, 2007, No. BC343105) which appellant apparently sued the Russakow firm for legal malpractice.

[5] The demand letter is not in the record.

court's December 2004 order and appellant had accepted payments and other benefits under respondent's obligations to the Rachel Harari Trust; (5) appellant was seeking "to unjustly enrich herself" in that she had used the December 2004 order "as a club to beat her attorneys" in an action in which she recovered nearly $616,000.

At a hearing on the motion, the court stated that it had learned from court-maintained computer files that appellant had obtained a judgment of nearly $616,000 in her suit against Russakow's firm. Accordingly, appellant was, in the court's view, seeking a "double benefit" in that her malpractice action had "more than compensated her for any amount . . . with respect to the mediator's award." The court also stated its tentative conclusion that laches barred the motion and that there was no extrinsic fraud. The matter was continued to allow appellant to file a reply brief. In her reply brief, appellant represented that the judgment in *Harari v. Russakow, et al.* had been appealed and that the case had settled during the pendency of the appeal.

At the final hearing, the court stated that although respondent had not made a "proper request for judicial notice of the jury verdict," it appeared from the information available to the court concerning the *Harari v. Russakow, et al.* litigation that appellant had already been compensated. Appellant's counsel objected to the court's taking judicial notice of a prior action without a formal request from respondent. The court stated it had taken judicial notice on its own motion. The court further stated that appellant's motion to vacate the December 2004 order would be denied on the ground that it was "not timely" and on the ground that there was no extrinsic fraud involving respondent. This appeal followed.

DISCUSSION

"'Once a decree of the probate court settling an account of a trustee becomes final, it is conclusive . . . on all parties interested in the estate.'" (*Estate of Lacy* (1975) 54 Cal.App.3d 172, 187, quoting *Estate of Charters* (1956) 46 Cal.2d 227, 234; accord, *Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 591.) However, where a final judgment or order is obtained through extrinsic fraud or mistake, courts have inherent equitable power to set it aside or vacate it. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981; *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 80-83; *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 737.)[6] The court's inherent equitable power to set aside or vacate judgments and orders in the case of fraud or mistake may be applied to "orders and decrees of probate proceedings." (*Estate of Sanders* (1985) 40 Cal.3d 607, 614; see, e.g., *Estate of Charters*, *supra*, 46 Cal.2d at p. 234; *Estate of Beard* (1999) 71 Cal.App.4th 753, 774.) A court's decision to grant or deny equitable relief is reviewed for abuse of discretion. (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 981; *Manson, Iver & York v. Black*, *supra*, 176 Cal.App.4th at p. 42.)

Appellant contends that her attorney's agreement to submit her dispute with respondent to binding mediation without her knowledge and consent constituted

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[6] As explained in *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 146 and *In re Marriage of Adkins* (1982) 137 Cal.App.3d 68, 76-77, a court's inherent power to vacate or set aside a judgment obtained through extrinsic fraud or mistake is independent of similar power conferred by statutes such as Code of Civil Procedure section 473. (See *Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 981 [trial court may vacate default on equitable grounds where statutory relief unavailable]; *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47 ["After the six-month period for statutory relief has passed, the court may still grant relief on equitable grounds, including extrinsic fraud or mistake."]; *Billings v. Edwards* (1981) 120 Cal.App.3d 238, 245 ["'Even though a party seeking relief from default bases his motion solely on section 473 of the Code of Civil Procedure, the court has power to treat the motion as one for equitable relief.'"].)

extrinsic fraud. Although extrinsic fraud is broadly defined as "encompass[ing] almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing" (*Estate of Beard*, *supra*, 71 Cal.App.4th at p. 774), the conduct supporting a finding of extrinsic fraud is generally that of the opposing party. (See, e.g., *In re Marriage of Park* (1980) 27 Cal.3d 337, 343 [husband concealed from court the fact that wife's absence on the day the court resolved various marital issues was caused by her involuntary deportation]; *In re Marriage of Grissom* (1994) 30 Cal.App.4th 40, 52 [wife signed stipulation agreeing to dissolution, property division and child custody arrangement after being informed by husband that her signature was required to stop the divorce proceedings]; see *Sporn v. Home Depot USA, Inc*. (2005) 126 Cal.App.4th 1294, 1300 ["'The essence of extrinsic fraud is one party's preventing the other from having his day in court'"]; *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 291 ["The vital question is 'whether the successful party has by inequitable conduct, either direct or insidious in nature, lulled the other party into a state of false security, thus causing the latter to refrain from appearing in court or asserting legal rights.'"].) Where the conduct in question is "not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense . . . the basis for equitable relief . . . [is] extrinsic mistake . . . ." (*Manson, Iver & York v. Black*, *supra*, 176 Cal.App.4th at p. 47.)

In the instant case, the alleged misconduct was that of appellant's attorneys alone. The attorneys purportedly stipulated to binding mediation without first obtaining the consent of their client.[7] There was no evidence that respondent was aware that appellant had withheld consent to the binding mediation or that he

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[7] The Supreme Court has made clear that an attorney engaged to litigate in a judicial forum cannot shift the matter to a different forum without the client's express consent. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 407-408.)

colluded in any way with appellant's attorneys. Where the judgment or order was entered as the result of conduct of the moving party's attorney, the issue is generally characterized as one of extrinsic mistake. (See, e.g., *Hallett v. Slaughter* (1943) 22 Cal.2d 552, 557 [where attorney mailed answer to complaint to court but answer was not filed, defendant "was prevented by extrinsic accident and mistake of fact from presenting her defense"]; *Heyman v. Franchise Mortgage Acceptance Corp*. (2003) 107 Cal.App.4th 921, 926 ["'Reliance on an attorney who becomes incapacitated . . . [is an] example[] of extrinsic mistake.'"]; *Aldrich v. San Fernando Valley Lumber Co., supra,* 170 Cal.App.3d at p. 738 [where client had been "effectively abandoned by the positive misconduct of his attorney," grounds for equitable relief "would be extrinsic mistake, rather than extrinsic fraud"]; *Turner v. Allen* (1961) 189 Cal.App.2d 753, 757-759 [relief from extrinsic mistake permitted where attorney answered complaint using client's fictitious name rather than his true name]; *Bartell v. Johnson* (1943) 60 Cal.App.2d 432, 434-437 [extrinsic mistake occurred where defendant failed to answer complaint because matters alleged had previously been litigated through appeal and attorney informed him after receipt of second complaint that "[t]he matter is now finally closed"]; but see *Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 Cal.App.3d 504, 508 [attorney's settlement of claim without client's knowledge or consent is neither extrinsic fraud nor mistake, but results in a "voidable" judgment, which the client may seek to vacate "within a reasonable time after learning of it, regardless of the time limitations in section 473 and regardless of rules governing relief in instances of extrinsic fraud or extrinsic mistake"].)

Whether the conduct at issue constituted potential extrinsic fraud or potential extrinsic mistake, however, the same analysis applies. It is well-settled that "[t]o qualify for equitable relief on the ground of extrinsic fraud or mistake, the moving party must demonstrate diligence in seeking to set aside the default once it was

discovered." (*Manson, Iver & York v. Black, supra*, 176 Cal.App.4th at p. 49; accord, *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290-291, quoting *Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147-1148 ["To set aside a judgment based on extrinsic fraud or extrinsic mistake, the moving party must satisfy three elements: 'First, the defaulted party must demonstrate that it has a meritorious case. Secondly, the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action. Lastly, the moving party must demonstrate diligence in seeking to set aside the default once it had been discovered'"] italics omitted; *Gibble v. Car-Lene Research, Inc*. (1998) 67 Cal.App.4th 295, 315.)

By her own account, appellant learned of her attorneys' misfeasance before the mediation which she claims deprived her of her right to a true adversarial hearing. She complained to Russakow but did not inform respondent, his attorney or the mediator that she had not agreed to the procedure.[8] A month after the mediator issued his award, respondent moved for approval of his accounting and proposed distribution of Trust assets based on the mediator's award. Had appellant come forward with proof that she had not consented to the mediation at the hearing, the issues raised in her motion to vacate could have been resolved before the order was entered. (See *Sanker v. Brown* (1985) 167 Cal.App.3d 1144, 1146-1147 [motion to set aside arbitration award and proceed to trial de novo should have been granted where attorney signed stipulation agreeing the arbitrator's decision would be binding without client's consent].) Instead, she permitted the attorneys she now accuses of threatening her and disregarding her instructions to continue to represent her in the probate proceeding, permitted the court to approve

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[8] Though appellant allegedly did not personally participate in the mediation, she was present in the offices where the mediation occurred and was aware of Russakow's intention to go forward despite her objections.

the proposed accounting and distribution without knowledge of her objections, and waited three and a half years before raising any issue pertaining to the order. Clearly, appellant did not demonstrate the diligence required for equitable relief.

Appellant contends the burden was not on her to establish timeliness or diligence but on respondent to demonstrate prejudice, citing authority governing the doctrine of laches. She is mistaken. As explained in *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 856-857, "[o]ne moving in equity to set aside a default judgment must act diligently in making his motion after he learns of the default judgment. This requirement is sometimes put in terms of laches [citations], but this is not the appropriate doctrine, because laches requires a finding of prejudice caused by the delay." (Accord, *In re Marriage of Baltins*, *supra*, 212 Cal.App.3d at p. 92 [where husband raised laches as a basis for denying wife's motion to set aside dissolution, court explained: "Laches, strictly speaking, is not [the] appropriate doctrine, because . . . [t]he [party opposing relief] is not required to prove the affirmative defense of laches[;] [r]ather, a party seeking relief from a judgment has the burden of showing reasonable diligence in discovering the grounds for relief and, after discovery, in seeking relief"].) The issue of laches arises where the moving party acted with reasonable diligence, but the opposing party contends he or she has nonetheless been prejudiced. (See, e.g., *Aldrich v. San Fernando Valley Lumber Co*., *supra*, 170 Cal.App.3d at pp. 740-741 [where moving party filed motion to vacate within one month of learning of dismissal, court considered whether opposing party had set forth evidence to establish prejudice].) Where there has been an extensive delay between learning of the fraud or mistake and moving for relief, the burden is on the moving party to first explain the delay. (See, e.g., *Manson, Iver & York v. Black*, *supra*, 176 Cal.App.4th at p. 49 [party learned her name had been added to default judgment in 2005, but did not move to set aside the judgment until 2008; diligence established by evidence that she consulted with

two attorneys and was advised incorrectly that there was nothing she could do]; *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1369 [trial court did not abuse discretion in finding diligence where moving party learned of mistake in June, but waited until December to move to vacate; evidence established he was actively attempting to resolve dispute through negotiation].)

"The determination [] whether a moving party has filed for relief with reasonably alacrity is addressed to the sound discretion of the trial court whose discretion will not be overturned on appeal absent a clear showing of abuse . . . ." (*Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1200.) The court ruled that appellant's motion was untimely. Appellant offered no explanation for the lengthy delay in filing the motion to set aside the December 2004 order. The court did not abuse its discretion in denying the motion.

DISPOSITION

The order denying appellant's motion to set aside the December 2004 order is affirmed. Respondent shall have his costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.